Had the appellant as occupier of the house such control over it as to prevent anything coming in, or being taken out without his sanction (5th Ed. *Gour* Vol. I, 815)? It would appear from the nature and number of the exhibits that he must have had cognisance of them (*R. v. Hari*[8], *Emp. v. Budh Lal*[9]), but even presuming this postulate against the appellant the case must be taken further to sustain the conviction.

I think the fact that the Police had to break in does take it one step further. It meant the appellant was in premises secured from within, and in the room in which he was found was discovered also property recently stolen.

The best proposition of law appropriate to this case which I have at my disposal is contained in *Woodroffe's Evidence* 9th Edition page 803, note (4):—

> The finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny is of itself insufficient to prove his possession; though if coupled with proof of other suspicious circumstances, it may fully warrant the conviction of the accused.

If the property had simply been discovered in the house occupied by the appellant, with no other circumstances of suspicion it is manifest that no conviction could have ensued. I think, after reference to such authorities as are here available, that there is a clear distinction to be drawn between a person in whose house stolen property is found unaccompanied by any other proved act or conduct of such person, and whose acts and conduct coupled with surrounding circumstances arouse irresistible conclusions of guilt in connection with the receiving or retaining of such property.

Here is a man whose door is barred to the Police, who is found hiding in the roof above property stolen a few days before. Was his conduct and were such circumstances compatible with conscious and voluntary possession?

On the evidence of witnesses seen and heard in the Court below the Magistrate held there was sufficient evidence for the appellant to be called upon for his defence; thereupon the appellant rested his case and the convictions followed.

I agree with the Magistrate. I find the surrounding circumstances sufficient to show a *prima facie* case of joint possession. I therefore consider there is insufficient ground for interfering and dismiss the appeal.

As regards sentence I have been exercised as to its leniency. Those who receive, retain, harbour or assist thieves merit exemplary punishment, for the conduct is conducive to crime in others. In my opinion in the conditions now prevailing more severe sentences are necessary, and I shall have to consider gravely my powers of enhancing sentences on any future occasion.

Appeal dismissed.

Re ALLAPITCHAY RAWTHER, DECD.; KADER BATCHA RAWTHER v. SYED AHMAD & ANOR.

[O. C. J. (Bostock-Hill J.) March 5, 1948]

[Penang — Originating Summons No. 164 of 1947]

Practice and Procedure — Civil Law Ordinance (Cap. 42), s. 3(f) — Application to stay suit — Suits commenced in different countries.

In this Summons, the plaintiff as sole surviving executor of the will of the deceased asked for his accounts to be taken in the Court. The 1st defendant was the attorney of the plaintiff from 1941 to 1947. In 1946 the 2nd defendant had filed a suit in Tanjore claiming an account of the Penang estate of the deceased. It was argued for the defendants that the Court should direct a stay of the proceedings until the determination of the Indian suit.

Held: the defendants had not shown that the proceedings were vexatious or oppressive and therefore the Court was unable to exercise its jurisdiction to stay the proceedings.

Cases referred to:—

(1) *Bayley v. Edwards* (1792), 36 E.R. 1029
(2) *Ostell v. Le Page* (1852), 42 E.R. 1121.
(3) *Thornton v. Thornton* (1886), 11 P.D. 176.
(4) *Mutrie v. Binney* (1887), 35 Ch. D. 614.
(5) *Logan v. Bank of Scotland* (1906) 1 K.B. 141.
(6) *Egbert v. Short* (1907) 2 Ch. 205.
(7) *Cohen v. Rothfield* (1919) 1 K.B. 410.
(8) *The London* (1931) P. 14.
(9) *St. Pierre v. South American Stores* (1936) 1 K.B. 382.
(10) *McHenry v. Lewis* 22 Ch. D. 397.

ORIGINATING SUMMONS.

E. D. de Buriatte for the plaintiff.

R. D. Hume for the defendants.

Bostock-Hill J. : — This Originating Summons came up for argument in open Court having been adjourned from Chambers for that purpose. The facts are as follows :

The deceased (who died in India on 15th October 1924) left 2 Wills, one in Tamil and the other in English and both dated 3rd October 1924. The Tamil Will appointed 5 Executors of which the plaintiff and V. P. S. Kalandar Mydin were two. In the English Will the plaintiff and the said V. P. S. Kalandar Mydin were the only 2 Executors.

After some litigation Probate of the 2 Wills was granted to the plaintiff and the said V. P. S. Kalandar Mydin in Penang on 22nd November 1926.

Certain house property in Penang was according to the Wills to be held in trust for an infant beneficiary who is the 2nd defendant herein.

The widow in 1926 filed a suit in Penang against the executors claiming an account of the Penang estate and as a result such account was taken and passed up to 28th June 1929 by the Penang Court in July 1930. The plaintiff was given "a clean sheet" and was allowed commission out of the estate.

In 1935 the said V. P. S. Kalandar Mydin died, leaving the plaintiff the sole surviving Executor.

In January 1941 the plaintiff appointed the 1st defendant herein to be his Attorney to manage the Penang estate when he (the plaintiff) went to India.

In 1944 the 2nd defendant attained his majority, and in 1946, when both he and the plaintiff were in India, he filed a civil suit in Tanjore, India, claiming an account of the Penang estate of the deceased as from the date of death. It is to be noted that plaintiff's account up to 28th June 1929 had already been passed by the Penang Court. The plaintiff attempted to oppose the taking of accounts in India by pleading that the Court there had no jurisdiction. He was unsuccessful in this, but appealed to the High Court of Madras where on 10th December 1947 his appeal on the plea of jurisdiction was rejected.

In June 1947 the plaintiff, who formerly carried on business here, returned to Penang and is endeavouring, his Counsel stated, to re-start business here. Before leaving India he received a Solicitor's letter (Exhibit G. dated 5th February 1947) written on behalf of the 1st defendant saying that he the 1st defendant was no longer acting as his Attorney and claiming arrears of salary, and remarking that he (the 1st defendant) had drawn his commission from the estate. In July 1947 letters (referred to later) passed between the plaintiff's Solicitor and the 1st defendant's Solicitors.

In August 1947 plaintiff commenced the present proceedings asking that his account be taken in this Court and that he be paid the commission due to him.

Some further correspondence ensued between the plaintiff's Solicitor and the Solicitors acting for the defendants regarding the collection of rents from the Penang property and the payment of assessment thereon. One of these letters, written by Messrs. Presgrave & Matthews on behalf of the plaintiff (dated 8th November 1947) states that "No handing over has yet been made to the beneficiary nor has any conveyance or assent to the devise been executed and registered and this will not be done until our client has had his accounts accepted and been granted a formal release. Your client's remedy is a simple one and that is either to accept the accounts or to have our client's accounts taken here." That put the plaintiff's position in a nutshell and no reply to that part of the letter was sent.

Plaintiff states in his affidavit of 29th August 1947 that on his return to Penang he called on the 1st defendant to hand over to him the estate accounts and that the 1st defendant refused alleging that he had handed the accounts to one M. K. Mohamed Kassim the attorney of the 2nd defendant. Plaintiff added that the property and all the evidence is within the jurisdiction of this Court.

On 24th February 1948, the 2nd defendant filed a short affidavit stating that the appeal (referred to above) in Madras had been decided in his favour. Other than this he filed no affidavit in reply to the plaintiff's affidavit of 29th August 1947, in which most of the above facts were set out.

On 25th February, 1948 the day before the hearing, plaintiff filed a further affidavit. In that affidavit he refers to a letter dated 16th July 1947 from his Solicitors to the 1st defendant's Solicitors asking for the 1st defendant's (i.e. the attorney of plaintiff) accounts and to a letter from 1st defendant's Solicitors dated 24th July 1947 saying that the accounts had been handed to one M. K. Mohamed Kassim, the attorney of the 2nd defendant. Plaintiff further adds in his affidavit that "at the present moment it is not within my power to produce any accounts" and goes on to allege that the 2nd defendant is conspiring with plaintiff's former attorney (the 1st defendant) and with M. K. Mohamed Kassim (the former attorney of the 2nd defendant) to deprive him of access to the estate accounts .... in the endeavour to force him to produce the accounts in India.

It is to be noted that it was only after these two letters (of 16th July 1947 and 24th July 1947) that the plaintiff commenced these proceedings.

It was agreed by Counsel that the main issue was "where are these accounts to be taken?" Also that this Originating Summons refers only to the Penang property of the deceased's estate. It is also to be noted that in the suit in India, plaintiff here is a defendant

and the present 2nd defendant here is plaintiff. The other defendants in India are the representatives of the deceased executor V. P. S. Kalandar Mydin.

Mr. Hume for the defendants asked the Court to exercise its powers to direct a stay of the present proceedings, or to make no order now, but merely to give liberty to the plaintiff to apply to take the account later if the Indian case is not proceeded with or if the account books are not produced in the ordinary way in the Indian Court.

He asked the Court to act under section 3(f) of the Civil Law Ordinance (Cap. 42) which corresponds to the Judicature (Consolidation) Act, 1925, section 41 (See 1941 *White Book* pages 2411 and 2415). He submitted that the Court has a wide power of discretion.

He pointed to Clause 25 of the Indian Will which directs the 2 Executors of the Penang Will to send every month the account and the sums collected to Executor No. 2 of the Tamil Will in India.

He also pointed out that when the Indian suit was commenced the present plaintiff was in India and urged that the plaintiff had refused to hand over the accounts and had not acted in a *bona fide* manner.

It was agreed by both Counsel that the Indian suit had nothing to do with the Indian estate — i.e. it concerned only the Penang estate.

It is to be observed that defendant No. 2 has put in no affidavit in reply to the plaintiff's first affidavit nor did he apply for time to put in a reply to the affidavit of plaintiff filed on 25th February, 1947, the day before the hearing.

Mr. de Buriatte put before me the following long line of authorities extending from 1792 to 1936 :—

Bayley v. Edwards[1]; *Ostell v. Le Page*[2]; *Thornton v. Thornton*[3]; *Mutrie v. Binney*[4]; *Logan v. Bank of Scotland*[5]; *Egbert v. Short*[6]; *Cohen v. Rothfield*[7]; *The London*[8]; *St. Pierre v. South American Stores*[9].

All these cases deal with the principles to be observed by the Court in exercising its discretion to order a stay where 2 suits are commenced in different countries by the parties concerned, but it will be sufficient for me to quote from two of the latest of them. The headnote in *Cohen v. Rothfield*[7] sums up the principles underlying most of the decisions. It is as follows :—

> Two parties having cross claims arising out of the same transactions for substantially the same relief, one commenced an action in England and the other an action in Scotland.
>
> **Held**, that in such a case the Court will not restrain the Plaintiff in either action from proceeding with his action unless it is satisfied that the continued prosecution thereof would be oppressive or vexatious. It is incumbent on the party seeking to restrain the other to show that the proceeding he complains of is oppressive or vexatious, and that the party instituting it can gain no advantage therefrom.

Scrutton L.J., after referring to the case of *McHenry v. Lewis*[10] (a case cited by Mr. Hume) stated at page 415 :—

> It appears to me that unless the applicant satisfied the Court that no advantage can be gained by the defendant proceeding with the action in which he is plaintiff in another part of the King's dominions, the Court should not stop him from proceeding with the only proceedings which he, as plaintiff, can control.

In *St. Pierre v. South American Stores*[9] Scott L.J. at page 398 states :—

> The true rule about a stay under section 41 (of the Judicature (Consolidation) Act 1925, so far as relevant to this case, may I think be stated thus: (1) A mere balance of convenience is not a sufficient ground for depriving the plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive and vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

Mr. de Buriatte also cited *Dicey's Conflict of Laws* (5th Edition) page 355 where the learned author states that the jurisdiction of the Court to stay proceedings will not be exercised against a party to an action unless his proceedings are clearly shown to be vexatious and oppressive.

In the present proceedings I am satisfied that the defendants have not shown that the proceedings here are vexatious or oppressive. Between them they have made it very difficult or even impossible for the plaintiff to get his account passed by the Court here. That is a duty he owes to the Court here since the Probate was granted in Penang. It is true that there were allegations made in Court that he had not done his duty as Executor and handed over the Penang property to the sole beneficiary (the 2nd defendant) when the latter came of age, but neither of the two defendants have chosen to answer the allegations made by the plaintiff about their conspiring together and making it almost impossible for him to pass his account in the ordinary way.

As Mr. de Buriatte argued, the property is here, the rents have been collected here and any repairs done to the property have been carried out here and it may be necessary to call witnesses from here at the taking of the accounts. Also it is for this Court to decide what, if any commission is payable to the plaintiff when the accounts are taken. In my opinion that is peculiarly the province of this Court and I think that a stay of the proceedings here might work injustice to the plaintiff.

I should be more ready to pay attention to suggestions that the plaintiff has not done his duty as Executor if the defendants had put forward allegations on oath against him, in which case they would have been liable to be subjected to cross-examination. As it is, the plaintiff had his account passed by this Court and was granted commission by this Court in 1930 and for the reasons stated above this would appear to be the proper Court for the taking of the account. Nor do I think the 2nd defendant will suffer any considerable hardship by this course. He is in this country now and if he and the 1st defendant really are anxious and willing to have the account taken, there need be no undue delay in the proceedings. It will not even be necessary, unless he so desires, for him to be here in person when the accounts are taken.

For all the above reasons I am of opinion that there should be no stay in these proceedings and accordingly I make an Order in terms of Prayer 1(a).

I think that as regards Prayer 1(b) and Prayer (2) this application should stand over until the accounts have been taken, except that I award solicitor and client costs of this Originating Summons up to date to plaintiff out of the Estate in any event.

Both parties to have liberty to apply.

Order accordingly.

JACOB v. PUBLIC PROSECUTOR

[A. Cr. J. (Callow J.) April 2, 1948]

[Seremban — Criminal Appeal No. 5 of 1948]

Penal Code s. 503 — Criminal Intimidation — Evidence of System — Witness called by Court after close of defence — Opportunity to be afforded to the defence to cross-examine and to call evidence in rebuttal — Evidence Enactment s. 15 — Criminal Procedure Code (Cap. 6), ss. 316(b) and 425.

This was an appeal against the conviction of the appellant for criminal intimidation. The two principal grounds of appeal were: (a) that the evidence of system was wrongly admitted in evidence; (b) that the defendant was not afforded an opportunity to rebut the evidence of the witness called by the Court, such witness having been called by the Court after the close of the case for the defence.

Held: (1) evidence of system should not be tendered before the testimony of the principal witness or at least his examination-in-chief has been heard as the nature of the defence will not then have become apparent by cross-examination; (2) in this case the evidence was in fact disregarded by the learned District Judge and did not influence him in arriving at his decision; (3) the Court may call further evidence even after the close of the defence if the evidence appears to be essential to the just determination of the case, but should the further evidence prove adverse to the accused then opportunity must be afforded the defence to cross-examine and to call evidence in rebuttal.

Cases referred to:—

(1) *Public Prosecutor v. Chong Ngan and Chan Hong* N. S. Criminal Trial No. 35 of 1947 — unreported.
(2) *Teo Koon Seng v. Rex* (1936) M.L.J. 10.
(3) *V. K. S. Samy v. Rex* (1937) M.L.J. 173.
(4) *R. v. Dora Harris* (1927) 2 K.B. 595.
(5) *R. v. McMahon* 24 Cr. App. R. 97.
(6) *Selvadurai v. Chinniah* (1938) F.M.S.L.R. 293; (1939) M.L.J. 253.
(7) *Mofizuddin Mondal & Anor. v. Sekandar Molla* A.I.R. (1934) Cal 133.
(8) *R. v. Howarth* 13 Cr. App. R. 99.

MAGISTRATE'S CRIMINAL APPEAL.

K. K. Benjamin for the appellant.

J. C. Kilner (D. P. P.) for the respondent.

Callow J. : —This is an appeal from the Court of the District Judge, Seremban, sitting at Kuala Pilah against the conviction and sentence of 12 months r.i. imposed on the 19th February, 1948, for criminal intimidation.

The petition of appeal contained 19 so-called grounds. Mr. Benjamin for the appellant very properly disassociated himself with twelve, saying quite correctly that they consisted largely of mere argument. It should be observed that Mr. Benjamin explained that owing to short notice and the intervention of the Easter holiday he had had no opportunity to revise and amend the grounds which had already been filed.

The two points argued, apart from sentence, were :—

(a) That the evidence of prosecution witnesses 2 and 3 was inadmissible, and acceptance necessarily affected the verdict; and
(b) The defendant should have been afforded an opportunity to rebut the evidence of the witness called by the Court.

On point (a) the learned Deputy Public Prosecutor submitted that section 15 of the Evidence Enactment sanctioned such evidence. I am doubtful whether the section can be held to include evidence of other acts of criminal intimidation against other persons on another day, so as to negative a possible misunderstanding by the principal witness Sanmugam (4 P.W.) when he came to give evidence later. I do not think the learned District Judge so held, and in consequence paragraph 3 of the grounds of judgment may be interpreted to mean that the evidence of prosecution witnesses 2 and 3 was disregarded.

Evidence submitted in accordance with the provisions of section 15 of the Evidence Enactment should be confined to the rebuttal of a defence of